Supreme Court, U.S.
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NO.

IN THE
Supreme Court of the United States

Nadezhda Ursini,
Petitioner,

v.

Alberto Gonzales, Attorney General,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress has authorized Immigration Courts to determine if an applicant for asylum has submitted a frivolous asylum application. Immigration and Nationality Act § 1158(d)(6). If such a determination is made, the applicant is forever barred from immigration benefits and relief in the United States. However, such a finding is only valid if substantial evidence supports the finding that the applicant knows her claim is false when she files her asylum application. Congress imposed this substantial limitation on frivolous findings because the consequences are so dire. For this reason, few frivolous findings are made, and they are only upheld when clear, tangible, and credible evidence support the finding.

The first issue presented relates to frivolous findings. Specifically, what is the correct standard to be used by the Immigration Courts; what is the appropriate time to evaluate the applicant's knowledge; and what constitutes sufficient evidence in properly determining if an asylum application is frivolous. These interrelated topics pose novel questions for this Court as well as the Board of Immigration Appeals ("BIA") and are the subject of current circuit splits.

The second issue deals with the lower court's gross departure from the accepted and usual course of judicial proceedings. Specifically, the lower court's streamlining in a case of this magnitude is a gross departure from accepted judicial proceedings; its choice to evaluate, on the merits, an unclear and inconsistent BIA decision abandons its review duties; and its judgment ultimately conflicts with holdings in sister circuits and precedent.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Nadezhda Ursini, respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit in this case.

OPINIONS BELOW

The November 7, 2006, opinion of the court of appeals (App., *infra*, 1a-3a), case number 04-72638, is unreported. The decision of the BIA (App., *infra*, 4a-5a), case number A77-539-697, is unreported. The initial and supplemental decision of the Immigration Court (App., *infra*, 6a-18a, 19a-20a), case number A77-539-697, issued by Judge Kendall Warren ("Judge Warren") with a handwritten, post-script frivolous finding order inserted by Judge Anna Ho ("Anna Ho"),[1] is unreported.

JURISDICTION

Although the opinion of the court of appeals was entered on November 7, 2006, the Petitioner timely filed a

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[1] Judge Warren, now retired, has been specifically reprimanded by the Ninth Circuit for his frustration and cultural bias in accepting an asylum applicant's testimony and in attacking said testimony. See Arulampalam v. Ashcroft, 353 F.3d 679, 682 (9th Cir. 2003).

Judge Ho has also been severely admonished by the Ninth Circuit for denying relief in decisions replete with bias, prejudgment, non-impartiality, speculation, conjecture, and improper reasoning. See Smolniakova v. Gonzales, 422 F.3d 1037 (9th Cir. 2005); Zolotukhin v. Gonzales, 417 F.3d 1073 (9th Cir. 2005); Singh v. Gonzales, 403 F.3d 1081 (9th Cir. 2005); Rivera v. Ashcroft, 387 F.3d 835 (9th Cir. 2004) amended by 394 F.3d 1129 (9th Cir. 2005); Paramasamy v. Ashcroft, 295 F.3d 1047 (9th Cir. 2002). Judge Ho is currently under federal review.

petition for rehearing and suggestion for rehearing en banc. The petition for rehearing was denied on January 19, 2007, (App., *infra*, 21a). The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2350(a). The lower court had jurisdiction pursuant to section 242(a)(2)(b)(ii) of the Immigration and Nationality Act.

STATUTORY PROVISIONS AND AGENCY REGULATIONS INVOLVED

Immigration and Nationality Act ("INA") § 208(d)(6), 8 U.S.C. § 1158(d)(6),[2] as enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IRRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996), and as amended in 1997,[3] provides:

> Frivolous applications. - If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter, effective as of the date of a final determination on such application.

In 1997, Congress amended section 208(d)(6) so that the frivolous bar to all immigration relief did not include withholding of removal.

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[2] All citations to INA sections will initially include their corresponding United States Code sections. Thereafter, they will be referred to only by their INA numbers.

[3] As the petitioner applied for asylum long before the enactment of the REAL ID Act of 2005, H.R. 1268, 109th Cong. (2005) (enacted), Pub. L. No. 109-13, Div. B., 119 Stat. 231, the pre-REAL ID Act provisions of the INA apply to this case.

Because of the severe consequences of a finding of frivolousness under INA § 208(d)(6), the implementing federal regulation, 8 C.F.R. § 208.20 (2000), prescribes the parameters within which an Immigration Judge ("IJ") or the BIA must operate in making these decisions:

> For applications filed on or after April 1, 1997, an applicant is subject to the provisions of section 208(d)(6) of the Act only if a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. For purposes of this section, an asylum application is frivolous if any of its material elements is deliberately fabricated. Such finding shall only be made if the immigration judge or the Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim. For purposes of this section, a finding that an alien filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal.

STATEMENT

This case presents the important and recurring compound question of 1) what comprehensive and uniform standard should be used by an Immigration Judge ("IJ") or the BIA when making a frivolous finding, and 2) at which point in time should the applicant's knowledge be evaluated regarding the frivolous finding. This Court has not yet reviewed a frivolous finding nor the standards employed by immigration judges in making such findings.

Further, the BIA has not issued a definitive opinion on this issue.

Only 12 published cases have ever been decided by the respective courts of appeals regarding frivolous findings. Although these decisions have begun to formulate three elements of frivolous findings derived from the federal regulation, these elements ignore the clear mandate in the statute and the regulation that the applicant know her application is frivolous at the time she files her application. Without clear direction regarding the timing of the applicant's knowledge and the uniform standard to be imposed, the factfinder has infinite discretion in making frivolous findings. This lack of proper standard and resultant gross discretion has handicapped the courts of appeals' ability to engage in fair and serious review.

Further, the courts of appeals have differed widely in their approaches to this issue, and such disparate courses of action and ad hoc review of frivolous findings have caused a significant circuit split on this important and widely applicable issue.

In the 12 published court of appeals cases addressing frivolous findings, five have overturned such findings while seven have upheld the findings. In the five cases that vacated the frivolous finding and/or remanded proceedings, such occurred because 1) the applicant was not given a sufficient opportunity to address the issues identified in support of the frivolous finding;[4] 2) the only

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[4] See Farah v. Ashcroft, 348 F.3d 1153 (9th Cir. 2003); see also Alexandrov v. Gonzales, 442 F.3d 395 (6th Cir. 2006); Muhanna v. Gonzales, 399 F.3d 583 (3rd Cir. 2005).

evidence supporting the frivolous finding was an adverse credibility finding, and such was not sufficient;[5] 3) consular determination that documents were fraudulent was based on unreliable and incredible hearsay;[6] and 4) evidence consisting of a flawed adverse credibility finding and a suggestion of fraud was not enough to conclusively determine that the applicant knew the application was false.[7]

In six of the seven decisions upholding the frivolous finding, tangible, credible, and undeniable evidence established the falsity of a material element of the asylum application. Such evidence consisted of 1) the applicant admitting that he/she lied on the asylum application and to the IJ;[8] 2) dental records conclusively contradicted applicant's stated age;[9] 3) a copy of newspaper from Library of Congress conclusively showed applicant's copy was a forgery;[10] and 4) a medical record determined to be fraudulent by issuing hospital.[11] In the seventh case, and

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[5] See Scheerer v. U.S. Attorney General, 445 F.3d 1311 (11th Cir. 2006), Muhanna v. Gonzales, 399 F.3d 583, (3rd Cir. 2005).

[6] See Alexandrov v. Gonzales, 442 F.3d 395 (6th Cir. 2006).

[7] See Liu v. U.S. Dept. of Justice, 455 F.3d 106 (2nd Cir. 2006).

[8] See Barreto-Claro v. U.S. Attorney General, 275 F.3d 1334 (11th Cir. 2001); see also Aziz v. Gonzales, 478 F.3d 854 (8th Cir. 2007); Kifleyesus v. Gonzales, 462 F.3d 937 (8th Cir. 2006).

[9] See Efe v. Ashcroft, 293 F.3d 899 (5th Cir. 2002).

[10] See Selami v. Gonzales, 423 F.3d 621 (6th Cir. 2005).

[11] See Ignatova v. Gonzales, 430 F.3d 1209 (8th Cir. 2005).

in direct contradiction to the Second circuit and to a case within its same circuit, the Sixth circuit upheld a frivolous finding based on solely on a consular determination that documents were fraudulent.[12]

Two circuit splits have arisen directly because there is no definitive standard or opinion on frivolous findings from the BIA or this Court. First, the Second Circuit and the Ninth Circuit, in closely analogous cases, have dealt with the fact that there is no definitive standard in wholly opposite ways. Second, the circuit courts are irrevocably split regarding consular determinations of alleged fraud and whether such unreliable decisions alone are sufficient to support a frivolous finding.

Finally, and to compound the adverse effect of this circuit split on the petitioner's specific situation, the lower decision reveals a gross departure from the accepted and usual course of judicial proceedings. When faced with an unclear and inconsistent BIA decision that specifically vacated Judge Warren's biased comment "you don't look Jewish," yet summarily affirmed the remainder of the decision without reaching the issue of frivolousness, the reviewing court should have remanded for a new BIA decision. In the alternative, and at the very least, the court should have heard oral argument because this case presents such complex and serious issues. By streamlining its review, and in fact by engaging in review at all of the BIA's inconsistent decision, the court abdicated its review duties and perpetuated the biased and unconstitutional handling of petitioner's case.

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[12] See Sterkaj v. Gonzales, 439 F.3d 273 (6th Cir. 2006).

Because this circuit split will not be resolved absent this Court's intervention, because this issue greatly affects the lives of countless asylum applicants, and because the Ninth Circuit's decision in this case in plainly wrong, review by this Court is necessary and warranted.

A. Statutory Background

Prior to 1997, the INA did not include provisions regarding frivolous findings. However, when Congress engaged in a comprehensive overhaul of immigration law by enacting IRRIRA in 1996, it added a provision forever barring an asylum applicant from immigration relief if she was found to have filed a frivolous asylum application. The statutory language, although not explicit in defining "frivolous," clearly intends that an asylum application may only be found to be frivolous if the applicant knew the application was false at the time it was filed. INA § 208(d)(6).

Because Congress did not define "frivolous application," the implementing regulation defined such as meaning when any material element is deliberately fabricated. § 208.20. The regulation also clarifies congressional intent on when the material element must have been deliberately fabricated. An application is frivolous only if the applicant deliberately fabricated a material element at the time of filing the application. Id. (emphasis added).

B. Factual Background

Petitioner Nadezhda Ursini ("petitioner") fled Russia and sought asylum relief in the United States because of

severe persecution suffered in Russia on account of her Jewish nationality and ethnicity. Petitioner suffered severe discrimination throughout her childhood from her classmates, their parents, and her teachers. As petitioner grew older, such animosity manifested itself in the form of physical violence and threats. For example, during college, petitioner was thrown out of her second floor dormitory window by the dorm manager and classmates who had been taunting her earlier that evening because she is Jewish. Petitioner suffered a brain concussion, a bone fracture in her hand, and a broken ankle. She was in the hospital for two weeks recovering from these injuries.

When petitioner began working, she continued to have problems. She was followed and received threatening telephone calls. In 1996, two assailants attacked her at the entrance of her apartment building. They beat her with a metal bar and kicked her until she lost consciousness. They yelled that Hitler was right and "kikes" should be dead. Petitioner believes these attackers were part of PAMYAT, a nationalistic group that persecutes Jews. This group had made threatening telephone calls to petitioner in the past. When petitioner was released from the hospital after one week, she immediately moved to Moscow to avoid more attacks.

In 1998, two individuals approached petitioner, saying they represent the Russian people and that Jews should not live in Moscow. They threatened that if she did not leave immediately, they would kill her. That night, arsonists set her car on fire. Petitioner did not witness the actual crime, but because of the close proximity of the arson with the death threats, she reasonably believed the same two anti-Semitic people torched her car.

Petitioner immediately moved to a new apartment. She hoped this move would save her from further persecution and death, but she knew she would continue to be persecuted because she is Jewish. Petitioner made plans to flee Russia, and she came to the United States to seek asylum.

C. Proceedings Below

Petitioner applied for asylum, withholding of removal, and withholding under the Convention Against Torture ("CAT") within three months of entering the United States. While her application was pending, she was placed in removal proceedings, and she renewed her application. Petitioner's individual hearing commenced on August 30, 2000, and concluded on October 17, 2002, when Judge Warren found petitioner not credible, denied her application for relief, and ordered her removed to Russia. The next day, Judge Warren realized that he had forgotten to include a frivolous finding in his oral decision. He then dictated an additional paragraph to his oral decision. Three months later, Judge Ho[13] added a handwritten, post-script to the order forever barring petitioner from any and all immigration relief.

Petitioner timely appealed to the BIA. The BIA specifically vacated the Immigration Judge's outlandish statement that petitioner "did not look Jewish." Despite vacating this biased statement and Judge Warren's reliance on such in his adverse credibility finding, the BIA nonetheless summarily affirmed Judge Warren's decision without reaching the frivolous finding.

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[13] See fn. 1, supra.

Petitioner timely filed a petition for review with the Ninth Circuit Court of Appeals.[14] After extensive briefing supported by Ninth Circuit case law, petitioner's case was scheduled for oral argument on October 23, 2006. Less than one week before the scheduled argument, the panel decided the case was suitable for decision without argument. On November 7, 2006, the panel dismissed the petition for review affirming both the adverse credibility finding and the post-script handwritten frivolous finding.

Petitioner timely filed a petition for rehearing and suggestion for rehearing en banc, identifying a circuit split between the Ninth and Second circuits and highlighting the legal and factual errors in the panel's decision. On January 19, 2007, the panel denied the petition for rehearing.

REASONS FOR GRANTING THE PETITION

A. A Uniform Standard That Properly Embodies The Frivolous Finding Statute And Regulation Is Required To Ensure Essential Oversight And National Uniformity.

When Congress added provisions to the INA in 1996 that permitted frivolous findings, it did not define "frivolous application. Nonetheless, because of the severe consequences of such a finding, Congress intended that such findings only be made when the applicant knowingly makes a frivolous applicant. INA § 208(d)(6).

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[14] Petitioner retained undersigned counsel to assist her with her petition for review. While briefing was being filed, petitioner's former counsel was suspended from the practice of law and was subsequently disbarred.

When the corresponding federal regulation was propounded, it too recognized the serious consequences of a frivolous finding and undertook to define "frivolous application" and "knowingly made" so as to provide parameters within which an IJ and the BIA must operate in making such determinations. Thus, the regulation defines "frivolous application" as meaning when "any material element is deliberately fabricated." 8 C.F.R. § 208.20. Although this definition is arguably quite broad, the overall applicability of this provision is narrowed by defining when an application is "knowingly made." The regulation requires that the applicant knowingly file an application in which any material element is deliberately fabricated (emphasis added). As such, a frivolous finding should only flow from a finding that an applicant deliberately fabricated a material element in the asylum application at the time of filing said application.

Thus, in making a frivolous finding, the factfinder must find that the applicant 1) deliberately fabricated, 2) any material element, 3) at the time of filing the asylum application. A fourth requirement, procedural in nature, requires that the applicant have sufficient opportunity to address the identified reasons for the frivolous finding.

To date, neither this Court nor the BIA have specifically addressed the law relevant to frivolous findings or the standards to be imposed on the factfinder. Without any guidance, IJs have been given immense discretion to make damaging frivolous findings. Because of the severity of the consequences of a frivolous finding, unfettered discretion was not intended to be given to the factfinder. Yet, without a uniform standard that implements all safeguarding elements of the statute and

regulation, such discretion and resultant ad hoc application of frivolous findings have created biased bars to relief and dangerous precedent.

As challenges to frivolous findings have made their way to appellate review, the respective courts of appeals have also dealt with such findings in an ad hoc fashion because they too are operating without a definitive, uniform standard. Several decisions have formulated three elements to frivolous findings: 1) deliberate fabrication, 2) of any material element, 3) so long as the applicant has sufficient opportunity to address reasons identified in support of the frivolous finding. See Liu, 455 F.3d at 113. Clearly ignored by the appellate decisions is the fact that the deliberate fabrication must occur when the application is filed.[15] Without this added safeguard, which requires that the applicant's knowledge be evaluated at the time the application is filed, the reach of INA § 208(d)(6) is much broader than intended by Congress and the implementing regulation.

Without a definitive decision by either this Court or the BIA regarding the proper standard to be imposed on factfinders in making frivolous findings, the Immigration Courts and the Courts of Appeal will continue to struggle with frivolous findings, will continue to impose such findings and review such findings in an ad hoc fashion, and will continue to perpetuate the circuit split that has already emerged from the courts' standardless decisions.

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[15] In fact, only one decision by a court of appeals, unpublished at that, identifies the requirement that the applicant know, at the time of filing, that a material aspect of her claim was untrue. See Lin v. Ashcroft, 83 Fed. Appx. 480 (3rd Cir. 2003).

B. The Federal Courts Of Appeal Are Irreconcilably Split On Several Issues Relevant To Frivolous Findings.

There can be no doubt that the federal courts of appeals are deeply and avowedly split on the questions presented by this petition, and that this circuit split, in light of the lack of agency direction or opinion, merits resolution by this Court. In fact, at least two circuit splits have arisen in the published opinions addressing frivolous findings. Both splits stem from the courts' ad hoc application of the statute and implementing regulation resulting in inconsistent review, especially where the evidence in support of the findings do not provide a clear answer as to the correct outcome.

Although the courts have begun to formulate a small body of case law on 1) what clearly does not constitute sufficient evidence to support a frivolous finding[16] and 2) what clearly constitutes sufficient evidence to support a frivolous finding,[17] no court has been able to review frivolous findings with the assistance and guidance of a

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[16] Three circuits have held that an adverse credibility finding alone is insufficient to support a frivolous finding. See Liu v. U.S. Dept. of Justice, 455 F.3d 106 (2nd Cir. 2006); Scheerer v. U.S. Attorney General, 445 F.3d 1311 (11th Cir. 2006); Muhanna v. Gonzales, 399 F.3d 583, (3rd Cir. 2005).

[17] Six decisions in four circuits have only upheld a frivolous finding when clear, tangible, and credible evidence conclusively established that an applicant lied and/or engaged in deliberate fabrication. See Aziz v. Gonzales, 478 F.3d 854 (8th Cir. 2007); Kifleyesus v. Gonzales, 462 F.3d 937 (8th Cir. 2006); Shami v. Gonzales , 423 F.3d 621 (6th Cir. 2005); Ignatova v. Gonzales, 430 F.3d 1209 (8th Cir. 2005); Efe v. Ashcroft, 293 F.3d 899 (5th Cir. 2002); Barreto-Claro v. U.S. Attorney General, 275 F.3d 1334 (11th Cir. 2001).

definitive, uniform standard. Without such a standard, the courts have engaged in ad hoc reviews of frivolous findings, creating circuit splits on two significant issues.

First, the Second Circuit and the Ninth Circuit have dealt with the fact that there is no definitive standard in wholly opposite ways. In Liu, the Second Circuit, dealing with an issue of first impression in its circuit, properly remanded to the BIA so that it could decide, in the first instance, the meaning of "knowingly" and "material element." 455 F.3d at 116.

Conversely, the Ninth Circuit, when faced with a factually analogous case to Liu and the lack of definitive standard from its own precedent,[18] the BIA, or this Court, nonetheless chose to review the frivolous finding instead of remanding for a clear agency decision in the first instance. The Ninth Circuit took such action in petitioner's case.

Both cases involved a flawed adverse credibility finding and questionable evidence of fraud. On the spectrum of "sufficient evidence to support a frivolous finding," both cases fell in the middle between mere adverse credibility findings on the one hand (insufficient)

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[18] Only two published cases in the Ninth Circuit address a frivolous finding. The first vacated the finding on procedural grounds, namely no opportunity to address the reasons for the finding. See Farah, 348 F.3d at 1158. The second decided an issue regarding the applicability of the frivolous provision when an application filed prior to IRRIRA was renewed after the amendments went into effect. See Almaghzar v. Gonzales, 450 F.3d 415 (9th Cir. 2006). Neither case discusses the frivolous finding requirements nor facts and evidence which might meet those requirements.

and tangible, credible evidence on the other (sufficient). In light of INS v. Ventura, 537 U.S. 12 (2002), and insufficient agency attention to the issue at hand, the courts of appeals must remand to the agency so that the BIA has the opportunity to decide an issue in the first instance. The Second Circuit properly followed this mandate. The Ninth Circuit did not, and its error has severely prejudiced not only petitioner's case but also the cases of all subsequent asylum applicants involving frivolous findings. The completely inapposite handling of closely analogous cases requires the attention of and decision by this Court.

Second, the circuit courts are irrevocably split regarding consular determinations of alleged fraud. The Third Circuit has held that unreliable, hearsay-laden consular determinations of forged documents do not support a frivolous finding. See Alexandrov, 442 F.3d at 407. Conversely, the Sixth Circuit has upheld a frivolous finding based solely on a consular determination of fraud. See Sterkaj, 439 F.3d at 279. The Ninth Circuit, in petitioner's case, has also held that a consular determination of fraud alone supports a frivolous finding.[19]

The two circuits upholding a frivolous finding based solely on consular determinations of alleged fraud contradict not only the Third Circuit's decision on point but also contradict every other published case that has upheld a frivolous finding. In these six other cases, the

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[19] The administrative record in the instant case is filled with unreliable, uncorroborated, and unauthenticated hearsay in the consular determinations used to support the alleged fraud.

frivolous findings were upheld because clear, tangible, and credible evidence of lying or falsity supported the finding.[20]

Consular determinations have been debunked by experts for several reasons: unreliable hearsay, double hearsay, inherent unreliability, lack of opportunity to cross-examine, nondisclosure of investigators and their methods, and official fraud and corruption. They are too intangible to be used as sole support of frivolous findings and their attendant severe and permanent consequences.

In light of this significant and important circuit split, this Court and/or the BIA must step in and conclusively decide how much conclusive and credible evidence of fraud/deliberate fabrication must be in the record to support a frivolous finding.

C. Review Is Also Warranted Because The Decision Below Is Clearly Incorrect And Reveals The Panel's Gross Departure From Usual Judicial Proceedings.

This Court's review of the lower court's decision is also necessary because the Ninth Circuit plainly erred in not only its handling of petitioner's case but also in its legally and factually erroneous decision. The court's procedural errors constitute a fundamental

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[20] Such evidence consisted of 1) the applicant admitting that he she lied on the asylum application and to the IJ; 2) dental records conclusively contradicted applicant's stated age; 3) a copy of newspaper from Library of Congress conclusively showed applicant's copy was a forgery; and 4) a medical record determined to be fraudulent by issuing hospital.

misunderstanding of its duty as a judicial entity of last review by right. These errors, which involve a streamlined review of petitioner's appeal, will have profound effects on many, if not all, subsequent asylum cases pending in the Ninth Circuit. The Ninth Circuit's gross departure from the accepted and usual course of judicial proceedings constitutes an issue of grave importance that warrants this Court's review, especially in light of the serious and dire consequences at issue in petitioner's case.

1. The Ninth Circuit's "streamlining" in a case of this magnitude is a gross departure from the usual course of judicial proceedings.

As discussed above, the consequences of a frivolous finding are serious and dire. Such consequences become even more severe when the decision implementing them and those upholding them are fraught with errors and bias. Consequences of this magnitude require full and impartial judicial review. The Ninth Circuit's "streamlining" approach to the petitioner's petition for review denied her full and impartial judicial review and constituted a gross departure from the accepted and usual course of judicial proceedings.

The petitioner's asylum case, encompassing removal proceedings and her appeals, is one of significant magnitude. Her merits hearings alone spanned over two years, and the administrative records comprises 747 pages. Several related findings and holdings are at issue: a biased Judge Warren, an unsupported adverse credibility finding, establishment of past persecution and presumption of future persecution, fear of future

persecution, and Judge Warren's latent frivolous finding/Judge Ho's handwritten, post-script frivolous order. Although the court had extensive briefing before it, it properly recognized that oral argument would provide necessary and beneficial exposition of these important issues. Oral argument was scheduled for October 23, 2006.

Thereafter, the panel assigned to this case inexplicably decided that the case could be decided without oral argument. This decision was made on October 17, 2006, less than one week before the oral argument.[21] Two weeks later, the panel dismissed petitioner's case in a one and one-half page, unpublished decision that purported to address both the adverse credibility finding and the arbitrary frivolous finding.

This handling of petitioner's case cannot be suffered. BIA streamlining has been held to be constitutional precisely because further federal review is available. If the circuit courts are permitted to themselves engage in streamlines, such action will eliminate this important safeguard. Such action is even more harmful because of the serious findings and circumstances at issue in petitioner's case. The courts of appeal represent the final review by right for an asylum applicant. If these courts are permitted to streamline their review of agency findings and decisions, gross injustice will occur.

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[21] The exact same procedural handling was imposed in another case on which undersigned is an attorney of record. After canceling oral argument, the Ninth Circuit cursorily dismissed that individual's appeal. Once is an anomaly. Twice is a coincidence. Any more, and the Ninth Circuit is streamlining its caseload to the detriment of asylum applicants.

2. The Ninth Circuit's decision to even review the BIA's unclear and inconsistent decision that did not explicitly reach the frivolous finding is also a gross departure from the usual course of judicial proceedings.

In her petition for panel rehearing and suggestion for rehearing en banc, petitioner highlighted as error the fact that the Ninth Circuit even chose to review the BIA's unclear and inconsistent decision. In its decision, the BIA specifically vacated Judge Warren's biased statements regarding petitioner's appearance and Judge Warren's own prejudicial stereotypes—"you don't look Jewish." Nonetheless, the BIA then summarily affirmed the remainder of Judge Warren's decision, including the handwritten, post-script frivolous finding. Although the BIA recognized Judge Warren's inherent bias towards petitioner, it then failed to take the next step and review his frivolous finding. These inapposite actions create an unclear decision. What exactly was the BIA affirming in light of its disaffirmance of Judge Warren's biased statements? The lower court should have recognized the deficiencies in the BIA's decision and remanded to the agency so that it would have the opportunity to reach the frivolous issue in the first instance. INS v. Ventura, 537 U.S. 12 (2002).

The courts of appeal are reviewing courts. Each court's duty is to review the holdings, findings, and the record within the parameters of applicable standards of review. If a lower decision is unclear and internally inconsistent, it is the reviewing court's duty to remand for a clear and consistent decision. Without a clear and

consistent decision, full and fair review is meaningless and borders on constitutional violation. Id.

In the instant case, the Ninth Circuit's review of the BIA's unclear and inconsistent decision constitutes a gross departure from the accepted and usual course of judicial proceedings. Such departure, and resultant violation of petitioner's right to full and fair judicial review, warrants this Court's review.

3. The Ninth Circuit's decision on the merits conflicts with decisions in its sister circuits as well as with its own precedent.

Finally, the Ninth Circuit's one and one-half page decision upholding Judge Warren's adverse credibility finding and frivolous finding clearly conflicts with its own precedent as well as published decisions from its sister circuits.

Regarding the frivolous finding, two cases from the Second and Third circuits are closely factually analogous to the petitioner's case. One case involved documents found to be fraudulent by consular officials. Alexandrov, 442 F.3d at 397. This determination was based on unreliable hearsay, and the Third Circuit correctly held that such consular determination alone was insufficient to establish that the applicant had knowingly filed a frivolous asylum application. Id. at 407. Another case involved a flawed adverse-credibility finding and a suggestion of fraud. Liu, 455 F.3d at 115. The Second Circuit, recognizing that this case presented an issue of first impression in its circuit, and recognizing the lack of uniform standard for what constitutes "knowingly" and

"material element," remanded to the BIA so that the agency could make a decision in the first instance. Id. at 116.

Despite these factually analogous cases, and despite the lack of a published decision directly on point within the Ninth Circuit,[22] the lower decision upheld Judge Warren's biased and arbitrary frivolous finding based solely on the consular determination that the arson reports were fraudulent. As several circuits and experts have recognized, these consular determinations are fraught with errors, unreliable hearsay, incredible and unidentified sources, unidentified investigators, and unavailability for cross-examination. See Alexandrov, 442 F.3d at 404-07. Despite such unreliability, consular determinations have become the Achilles heel in countless meritorious claims for asylum. Permitting these determinations to be the sole basis for a frivolous finding is ethically wrong and unconstitutional. The lower court's decision upholding Judge Warren's frivolous finding, based solely on a consular determination of fraud, conflicts with decisions in other circuits and defies the intent of the statute and regulation.

Regarding the adverse credibility finding, the Ninth Circuit itself has held that a fraudulent document cannot support an adverse credibility finding if the applicant did not know it was fraudulent. See Yemaine-Berhe v. Ashcroft, 393 F.3d 907, 911 (9th Cir. 2004) (holding that an allegedly fraudulent document, even if it went to the heart of any asylum claim, is not automatically determinative of an adverse credibility finding). Other

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[22] See fn. 18, supra.

circuits have also held that allegedly fraudulent documents cannot support an adverse credibility finding it the applicant did not know it was a forgery. See Hanaj v. Gonzales, 446 F.3d 694, 699 (7th Cir. 2006); Kourski v. Ashcroft, 355 F.3d 1038, 1039-40 (7th Cir. 2004).

Finally, consular determinations of fraud, when such unreliable, hearsay determinations are the sole basis for an adverse credibility finding, have been held to not be substantial evidence sufficient to support an adverse credibility finding. See Ezeagwuna v. Ashcroft, 325 F.3d 396 (3rd Cir. 2003). The seminal holding of this case was specifically identified to the Ninth Circuit. Yet the latter ignored the Third Circuit's reasoned analysis vacating on the issue of credibility and unreliable consular determinations.

The lower court's errors of law and fact constitute a gross departure from the accepted and usual course of judicial proceedings. Such departure requires review by this Court to correct the significant errors committed by the lower court.

D. This Issue Is Of Substantial Practical Importance And Will Affect Many Asylum Applicants.

The courts of appeals began reviewing frivolous findings in 2001. However, over the next four years, the courts issued only three published decisions on frivolous findings. That number doubled in 2005, and there have been six such decisions since then. We can only expect that number to continue to increase exponentially.

Not only will IJs and the BIA continue to make frivolous findings, but such findings will only become more commonplace in light of the INA amendments made in the REAL ID Act of 2005. In this act, Congress instituted heightened credibility and corroborating evidence standards and requirements. See INA § 208(b)(1)(B)(iii). Any inconsistency will now result in an adverse credibility finding. Applicants are also expected to submit reasonably attainable corroborating evidence. Such corroborating evidence will likely be sent to the respective consulates for verification and fraud findings. Frivolous findings will then ensue.

Without a uniform standard that embodies all elements of the statute and implementing regulation, there can be no hope for national uniformity in issuing and reviewing frivolous findings. Further, the immigration courts must be given specific and clear standards within which to make frivolous findings. Unless such standards are definitively provided by either this Court or the BIA, the immigration courts will continue to use their unfettered discretion is making unsupported and arbitrary frivolous findings. The courts of appeal, in turn, will be flooded with cases involving frivolous findings and will continue to review such findings in an ad hoc fashion. A definite opinion on the issue of frivolous findings must be issued. The severe and permanent consequences of such findings evidence the importance of this issue. This Court must step in to provide or remand for a uniform, comprehensive standard in making and reviewing frivolous findings.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that this writ of certiorari be granted.

Respectfully submitted.

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APRIL 2007

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NADEZHDA URSINI,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney General,

Respondent.

FILED November 7, 2006
Cathy A. Catterson, Clerk
U.S. Court of Appeals
No. 04-72638

INS No. A77-539-697

MEMORANDUM[23]

On Petition for Review of an Order of the Board of Immigration Appeals

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[23] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Submitted October 23, 2006[**]
Seattle, Washington

Before: **KOZINSKI** and **FERNANDEZ**, Circuit Judges, and **WINMILL**,[***] District Judge.

1. The IJ correctly found that petitioner lacked credibility, because she submitted two false documents that went to the heart of her asylum claim. After submission of the first false document, petitioner was afforded an opportunity to submit additional documentation. In response, she submitted another document that the IJ determined to be fraudulent. It was thus more than "reasonable to infer that a[n applicant] with a legitimate claim does not usually find it necessary to invent or fabricate documents in order to establish asylum eligibility." Matter of O-D-, 21 I.&N. Dec. 1079, 1083 (BIA 1998). Because substantial evidence supports the adverse credibility finding and no other evidence submitted compels us to conclude to the contrary, her asylum claim necessarily fails. See 8 U.S.C. 1252(b)(4)(B). Petitioner thus similarly fails to qualify for

[**] This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

[***] The Honorable Lynn B. Winmill, Chief United States District Judge for the District of Idaho, sitting by designation.

withholding of removal. See Acewicz v. INS, 984 F.2d 1056, 1062 (9th Cir. 1993).

2. An asylum application may be found frivolous if: (1) petitioner received notice of the consequences of filing a frivolous application, 8 U.S.C. 1158(d)(4)(A); (2) "any of its material elements is deliberately fabricated," 8 C.F.R. § 208.20; and (3) petitioner was given "an opportunity to explain any discrepancies in the testimony before a finding of frivolousness—permanently barring immigration relief—is entered." Farah v. Ashcroft, 348 F.3d 1153, 1157 (9th Cir. 2003). Substantial evidence supports the IJ's frivolousness finding. First, the record shows, and Ursini does not dispute, that she was given notice. Second, the IJ reasonably concluded that the false documents were material and went to the heart of petitioner's claim, because the alleged arson incident was the tipping point in her decision to leave Russia. Finally, petitioner was given ample opportunity to respond. She responded to the first false document by submitting another false document. When the IJ determined that petitioner affirmatively submitted a second forged document, she was given three more weeks to explain the discrepancy. Because she failed to respond, it was reasonable for the IJ to conclude that Ursini knowingly filed a frivolous application.

PETITION DENIED.

U.S. DEPARTMENTOF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

FALLS CHURCH, VIRGINIA 22041

DECISION OF THE BOARD OF IMMIGRATION APPEALS

File: A77 539 697 – Seattle Date: May 4, 2004

In re: NADEZHDA RATMINOVNA URSINI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Dennis F. Olsen, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)]–In the United States violation of law

APPLICATION: Asylum, withholding of removal; Convention Against Torture

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ORDER:

PER CURIAM. The respondent, a citizen of Russia, is appealing the October 17, 2002, decision of the Immigration Judge denying her application for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U,.S.C. §§ 1158, 1231 (b)(3), as well as her request for the protection under the United Nations Convention Against Torture, 8 C.F.R. § 1208.16(c). The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) has not filed an appeal brief.

We adopt and affirm the Immigration Judge's decision, except for the Immigration Judge's statement made in passing at page 11 of the decision regarding the respondent's lack of Jewish "features." The appeal is otherwise dismissed. *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the [I]mmigration [J]udge articulated in his or her decision").

/s/

FOR THE BOARD

U.S. DEPARTMENTOF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

UNITED STATES IMMIGRATION COURT

Seattle, Washington

IN REMOVAL PROCEEDINGS

File: A77 539 697 – Seattle Date: October 17, 2002

In the Matter of NADEZHDA RATMINOVNA URSINI
Respondent

CHARGE: Section 237(a)(1)(B) INA – non-immigrant who remained longer than permitted.

APPLICATIONS: Section 208(a) INA – asylum; Section 241(b)(3) INA - withholding of removal; Relief under Torture Convention; Section 240B INA– voluntary departure.

ON BEHALF OF RESPONDENT:
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2707 Colby Avenue,
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ON BEHALF OF SERVICE:
Gregory E. Fehlings
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ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 32-year-old unmarried female, native and citizen of Russia, who entered the United States at Seattle, Washington on March 21, 1999 as a Class B-1 non-immigrant visitor authorized to remain until June 20, 1999. She was apprehended by the Immigration and Naturalization Service on October 23, 1999 according to the Form I-213 prepared by an Immigration agent which is marked Exhibit 2. The respondent was residing with a boyfriend, Pavel Vorbiev who was involved in buying stolen vehicles. The respondent was not indicated to be involved in any illegal activity, however, it was determined that she was unlawfully in the United States and was placed in removal proceedings by the issuance of a Notice to Appear (NTA) on August 23, 1999.

In proceedings before an Immigration Judge, the respondent was represented by counsel. She conceded proper service of the NTA and it was marked Exhibit No. The factual allegations admitted in the NTA were admitted and the respondent conceded that she was subject to removal as a non-immigrant who had remained for a longer time than permitted. The respondent declined to designate a country for removal if that ever became necessary, and the Court therefore designates Russia, the country of her birth and citizenship.

The respondent expressed fear of persecution if she must return to Russia and submitted an application for asylum before the Immigration Judge. It is determined

that she is eligible to apply for asylum under Section 208(a)(2)(B) which establishes a requirement that aliens apply for asylum within one year of admission. The Court notes that the application was actually filed a s few days short, but she had formally stated her intention to apply for asylum in less than one year and has substantially complied with the statute is the finding of the Court.

The respondent also applied for withholding of removal and relief under the Convention against Torture. She is not eligible for voluntary departure because she arrived less than one year before the NTA was issued, Section 240B(b)(1)(A), and she is not taking voluntary departure at the beginning of the proceeding but rather at the conclusion of the proceeding.

Other pleadings and evidence were submitted and marked as follows. Exhibit No. 4 is a response from the Department of State. The application had been sent to the Department of State pursuant to 8 C.F.R. 208.11. The Department of State responded by simply attaching a copy of the November 1997 Profile of Asylum Claims and Country Conditions relating to Russia.

Exhibit No. 5 is the Immigration Service pre-hearing statement. This includes news articles, a copy of the respondent's Form I-94 showing her admission as a non-immigrant on page 6, also identification relating to the respondent on page 7. Pages 8 through 32 are copies from three different passports. Pages 33 through 43 consist of the World Fact Book relating to Russia, and page 44 and forward is the Country Report on Human Rights Practices relating to Russia for the year 1999 dated February 25, 2000.

Exhibit No. 6 is the respondent's pre-hearing statement which includes articles concerning the respondent's application for asylum, her hospitalization records in 1996, a birth certificate, photographs of Russian fascists and anti-somatic [sic in original] groups in military dress in Russia and various other articles concerning right wing factions in Russia, and harassment of Jews in Russia.

Exhibit No. 7 is an objection of the Immigration and Naturalization Service objecting to certain medical records submitted by the respondent, certain photographs, and there was an objection to the translation of two news articles.

Exhibit No. 8 is a certified copy of a report from a fire department in Moscow, the Department of State fire fighting service of the northwest administrative district of the second regional department of the state fire supervision, Moscow, Palnernaya Street, 4-A. It indicates that the certificate confirms that on September 7, 1998, a fire took place in a Volkswagen automobile on the parking lot at an address which is indicated. As a result of the fire, the automobile burned up completely. The most probably cause for the fire was arson.

Exhibit No. 9 is the Immigration Service supplemental document which is a copy of the respondent's original asylum application. The application which was adjudicated in these proceedings was marked Exhibit No. 3 but this exhibit is an application prepared by the respondent earlier and it indicates receipt by the Immigration Service on June 14, 1999. It appears to have been signed by the respondent on June 9, 1999.

Exhibit No. 10 is a statement in support of the respondent's application signed by Alexander Ravikovich on behalf of the respondent.

Exhibit No. 11 is an article concerning Alexander Ravikovich indicating that he is a 40-year-old doctor from the former Soviet Union who operates the European Health Center, a Russian style spa out of a 1,000 square foot strip mall office in the Overlake area in Bellevue, Washington.

Exhibit No. 12 is a consent of the respondent for the Immigration Service to investigate the fire report contained in Exhibit No. 8. This was executed after completion of testimony in this matter. The proceedings were delayed for quite some period of time awaiting for this investigation to be concluded.

Exhibit No. 13 is a memorandum from the Service attorney indicating that the embassy in Moscow needed more time in order to make the necessary inquiry.

Exhibit No. 14 is supplemental documentation from the Immigration Service. This contains an investigative report from the U.S. Embassy in Moscow. It indicates that the writer of the report contacted officials from the fire department including Galina Vasilyevna Druz, head of the records department. According to these officials, this document is fraudulent. First, they pointed out that the location of this fire (Profsoyuznaya) is well outside the jurisdiction of their department. In addition, the numbering system (located directly under the date) used on the document in question has never been used by this department. Finally, they stated that the signature on this

document is a forgery. Attached [to] the memo is a copy of the Russian version of the report with certain portions of the report circled and notations made to explain the parts of the document to which the report refers.

Following these revelations, the respondent sought permission from the Court to make further investigations and obtain further documentation as she did not concede that the documents was fraudulent, and indicated that by getting another document from the fire department, this confusion could be cleared up. Accordingly, the matter was continued further for that purpose and the respondent did obtain another report which purports to be from the Department of State fire fighting service of the northwest administrative district of the city of Moscow, 123481 Moscow, Palnernaya Street, 4-1. The report indicates that they confirm that on September 7, 1998, a fire took place in a Volkswagen vehicle (license numbers omitted) located at the parking lot at a specified address in Moscow. As a result of the fire, the automobile burned up completely. The most probable cause for the fire was arson.

Upon receipt of Exhibit No. 15, the Service sought leave to further investigate this report and on September 17, 2002 the Service submitted another report from an Immigration assistant in the embassy in Moscow. It reads "on July 25, 2002, a memorandum was received from Gregory Fehlings, Assistant District Counsel, Office of the District Counsel, Seattle, Washington, requesting that INS, Moscow verify a certificate submitted by Nadezhda Ursini in support of her asylum application. [End quotation omitted]. This certificate dated December 10, 2001 was purportedly issued by the fire department of the

northwest administrative district located on Palnernaya Street in Moscow, Russia.

On August 14, 2002, the writer visited this fire department and spoke to the deputy chief of the department. According to this official, this document is fraudulent. First, he pointed out that the signature on the document is a forgery. Furthermore, he stated that Mr. Gvozdev was no longer working at the fire department at the time that the document was purportedly issued. On receipt of this information, the Court concluded that no further inquiry need be made into that document and the Court was satisfied that it was a counterfeit or fraudulent document.

Testimony was taken in this matter. The first testimony occurred on August 30, 2000. When the direct examination was completed, the testimony was concluded on December 6, 2000. The respondent testified that she is Jewish, although her internal passport does not say she is Jewish. She indicated that she sometimes celebrated Jewish holidays but not on a regular basis. When she was with her father, he opposed the Jewish celebrations since she was Jewish through her mother's side of the family. She indicated that the family moved to Moscow when she was in the seventh grade in 1985. In 1986, her father was discharged from the army and taught school. From 1986 through 1988, the respondent lived in St. Petersburg and during that time she would attend synagogue with her mother. In 1989, her father died. That same year the respondent began attending Tevr University. She described in some detail the manner in which she was rudely and poorly treated at the school. The most severe and dramatic which she described involved a man by the

name of Bilov who she stated was especially hateful towards Jewish people, and on one occasion when she was in her room, he and his roommates came into her room and threw her out of the window where she landed on hard packed snow and was injured. This required hospitalization. In June 1994, she graduated from the university and started working as an accountant in July of the same year. In November 1995, she began getting calls and threats from people who were aware that she was Jewish and wanted her to leave the neighborhood. However, she was not harmed during this period of time. In August of 1996, she made a trip to the United States and remained about ten days. She then returned to Russia and in November of 1996, she was attached and severely beaten which resulted in hospitalization for her according to her testimony. A report of this is contained in Exhibit 6 on page 11.

In September 1997, the respondent made a second trip to the United States and remained approximately two weeks. She then returned to Russia where she lived without incident until July 1998 when she made a third trip to the United States. Upon her return to Russia in September 1998, some people visited her and told her to leave the neighborhood or they would kill her. The incident concerning the arson of her car allegedly occurred in July of 1998. It was her testimony that her car was burned by anti-sematic people and that was why she submitted the report contained in Exhibit No.8. Her last arrival in the United States was on March 21, 1999.

Aliens who seek asylum and withholding of removal bear the burden of establishing eligibility under Sections 208(a) and 241(b)(3) of the Act respectively. To establish

eligibility for withholding of removal, an alien's facts must show a clear probability of persecution in the country designated for removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The clear probability standard requires a showing that it is more likely than not that an alien would be subject to persecution if returned to the country from which she seeks withholding of removal.

The burden of proof required to establish eligibility for asylum is lower than that required for withholding of removal. An applicant for asylum has established that her fear is well-founded if she shows that a reasonable person may well fear persecution even where the likelihood is significantly less than clearly probable but there must be a reasonable possibility of actually suffering such persecution. Therefore, the applicant must show that a fear of persecution is both subjective[ly] genuine and objectively reasonable.

The objective component requires a showing by credible, direct, and specific evidence in the record of facts that would support a reasonable fear that the applicant faces persecution based on one of the five grounds alleged.

To be granted withholding of removal to a country under the Convention against Torture, she must show that it is more likely than not that she would be tortured in that country. For an act to be considered torture, it must be an extreme form of cruel and inhuman treatment which causes severe physical or mental pain and suffering and must be so intended. Torture must be inflicted by or at the instigation of a public official or someone acting in an

official capacity or with the consent or acquiescence of such an official.

The alien bears the evidentiary burden of proof and persuasion. The facts underlying the claim must be established by a preponderance of credible, probative evidence. An alien's own testimony without corroborative evidence may be sufficient proof if the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for her fear of persecution.

A witness's testimony may be discredited for a variety of reasons. For instance, there may be other facts of record which cast a doubt on the claim or the claim may be internally inconsistent and may lack the ring of truth. Testimony may be discredited by the witness's demeanor, by contradictory evidence or by inherent improbability, or because the witness has an admitted history of dishonesty. In the instant case, the Court has concluded that the respondent is not credible. Initially, before learning of the counterfeit document, the Court only had some suspicions as to her lack of credibility. For example, the fact that it seemed very unusual that people were always able to find out that she was Jewish considering she had an Italian last name and she did not have any features that would suggest that she was Jewish to the extent that that is possible to detect from visual inspection, and her internal passport did not indicate that she was Jewish. Nonetheless, there was always a possibility that there were other means of finding out although it would not [have] been probably from attending synagogues since she indicated that she rarely went. One of the aspects that made the Court wonder is that many of the problems that she had preceded her trips

to the United States without ever applying for asylum, suggesting that she felt no particular peril or that her life was in danger. She had already been hospitalized at least twice according to her testimony before the 1997 and 1998 trips to the United States. However, it was the false documents submitted in support of her claim in the form of the fire department report that has caused the Court to conclude that the respondent is not credible. As noted by the Board of Immigration Appeals in Matter of O-D-, 21 I&N Dec. 1079 (BIA 1998). Quoting from U.S. v. Strother, 49 F.3d 869 (2nd Cir. 1995), "ordinarily it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or a statement to establish his innocence". That quotation is taken from a criminal case which refers to guilt and innocence but the same principle applies here. If an asylum applicant is proceeding in good faith, there should be no reason to submit even one false document much less two. The Court, therefore, finds that the respondent has submitted a fraudulent document in support of her application with the intention of deceiving the Court. She is, therefore, found not to be credible and it has been determined by this Court that her application lacks veracity. An application which lacks veracity cannot satisfy the burdens of proof and persuasion necessary to demonstrate eligibility for asylum and related relief. See 8 C.F.R. 208.13(a), 208.16(b); Demirovsky v. INS, 39 F. 3d 177 (7th Cir. 1994); see also Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

Accordingly the Court finds that the respondent has not met her burden of establishing that she has a well-founded fear of persecution for purposes of asylum or that there is a clear probability that she would be persecuted

for purposes of withholding of removal or relief under the Torture Convention.

Accordingly, the applications will be denied. As previously stated, the respondent is not eligible for voluntary departure because she had not been physically present in the United States for a period of one year at the time that the NTA was issued. Accordingly, the voluntary departure cannot be granted.

The Court has further concluded that the respondent deliberately tried to deceive the Court by offering into evidence two false documents for the purpose of convincing the Court that her car had been burned by her alleged tormentors in Russia, and the Court concludes that because of her attempt to deceive the Court through this false document, her application must be deemed as frivolous and the Court, accordingly, so finds. The respondent was warned at the outset of the consequences for filing a frivolous asylum claim.

The following orders will, therefore, be entered:

ORDERS

IT IS HEREBY ORDERED that the respondent's application for asylum is denied.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal is denied.

IT IS FURTHER ORDERED that the respondent's application for relief under the Convention against Torture is denied.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Russia on the charge contained in the NTA.

IT IS FURTHER ORDERED that the respondent be barred forever from seeking any relief under the Immigration + Nationality Act for filing a frivolous asylum application. KW by AH 1-9-03 (Handwritten post-script)

[Signed] Kendall Warren by IJ Anna Ho
KENDALL WARREN
U.S. Immigration Judge

A77 539 697 October 17, 2002

U.S. Department of Justice
Executive Office for Immigration Review
Office of the Immigration Judge

IN REMOVAL PROCEEDINGS

File: A 77 539 697

In the Matter of

Nadezhda Ratminovna URSINI

Respondent

ORDER OF THE IMMIGRATION JUDGE

Yesterday, before entering the Court's oral decision, the undersigned advised the parties that he intended to make a finding that the asylum claim was frivolous, pursuant to § 208(d)(6). In the oral decision, however, the undersigned forgot to mention it, which was merely an oversight, not a deliberate omission. After the parties left, the undersigned remembered this finding and dictated it into the decision, so that it will be included in the oral decision when it is transcribed.

If either party x objects to the inclusion of **xxxxx** this additional paragraph after the parties had left, they may notify the Court within 5 days (no later than October 25, 2002), and the matter will be reconvened. The Court will then reopen the matter on it's [sic] own motion and dictate the paragraph in the presence of the parties. If no objection is received, the paragraph, in which the finding is made under § 208(d)(6) will remain in the decision as a part of it, and will be deemed to have been properly included in the decision, per consent of the parties.

It is so ordered

Date: 10-18-02
Place: Seattle, WA /s/
(Immigration Judge)

1 RECORD FILE COPY **Form EOIR-23**
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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NADEZHDA URSINI,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney General,

Respondent.

FILED January 19, 2007
Cathy A. Catterson, Clerk
U.S. Court of Appeals
No. 04-72638

INS No. A77-539-697

ORDER

Before **KOZINSKI** and **FERNANDEZ**, Circuit Judges, and **WINMILL**,* District Judge.

The petition for rehearing and rehearing en banc is **DENIED**. See Fed. R. App. P. 35; Fed. R. App. P. 40.

* The Honorable Lynn B. Winmill, Chief United States District Judge for the District of Idaho, sitting by designation.